ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

# Committee on Regulation

Minutes

March 7, 2012

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Members Attending

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| H. Russell Frisby (Chair) | Susan Dudley | Don Elliot |
| Christy Walsh | Gillian Metzger (by phone) | Richard Wiley (by phone) |
| David Fredrickson (alternate for Mark Cahn) (by phone) | | |

ACUS Staff Attending

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| Paul Verkuil<br>*Chairman of the Conference* | Jeffrey Lubbers<br>*Acting Research Director* | Reeve Bull<br>*Staff Counsel* |
| Christopher Shannon<br>*Intern* | | |

Invited Guests Attending

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| Wendy Wagner (Consultant) | Jamie Conrad (Conrad Law & Policy Counsel) | Bridget Dooling (Government member) |
| Remington Gregg (Government member) | Francesca Grifo (Union of Concerned Scientist) | Jim Tozzi (Public member) |

**Meeting Opening**

The meeting commenced at 1:00pm. Committee Chair Russell Frisby opened the meeting of the Committee on Regulation of the Administrative Conference of the United States (ACUS), noted the difficult issues involved with the research, and observed that people tend to have strong views regarding agencies' use of science.

**General Overview of Professor Wagner's Recommendations**

Consultant Wendy Wagner discussed the methodology and findings of the Science in the Administrative Process Project. Ms. Wagner described the project as focusing on transparency in agencies' use of science. She indicated that she chose to study the Environmental Protection

Agency (EPA), the Department of Interior's Fish and Wildlife Service (FWS), and the Nuclear Regulatory Commission (NRC) because of the significant variation in their respective processes. She then provided an overview of her recommendations.

Mr. Frisby stated that there would likely be consensus on some of the recommendations, but others likely required further research. He then opened the floor to committee member comments.

Public Member Susan Dudley stated that the Administrative Conference is not the place to air grievances between agencies and noted the hostility towards the Office of Management and Budget (OMB) in the report. She also questioned the focus on external factors affecting the process. Public Member Don Elliot noted that the report lacked external analysis of the Agencies' review processes and did not include enough input from the National Academy of Sciences (NAS). He stated that he liked the use of the EPA's National Ambient Air Quality Standards (NAAQS) process and recommended that a study of the Food and Drug Administration (FDA) could be useful. He also expressed concern over the normative basis for the study's recommendations. Public Member Jim Tozzi voiced the need for a high level of completeness for ACUS recommendations, and identified two areas lacking completeness: (1) it is unclear whether the report recommends that the Office of Information and Regulatory Affairs' (OIRA) meetings should be open to the public and (2) it is also unclear whether the report asserts that people make better decisions if they are on the record.

Ms. Wagner responded to Mr. Tozzi's comment by stating her recommendations did not call for open OIRA meetings; they only required OIRA to log changes made to the rule and state why they made those changes. She then addressed Ms. Dudley's and Mr. Elliot's concerns. She stated that she did not focus entirely on OMB in her report. She also stated that finding a normative framework can be tricky as there is not much in the literature. She noted that her normative framework does not say what's best; it was based on reviewing what the president wanted and then exploring how that would work. She also described how she did talk to 3 or 4 outside scientists and plans to pursue additional interviews.

Mr. Elliot stated that, because it is our task to improve the administrative process, what the President says does not foreclose further debate. He endorsed the idea of a joint workshop between the NAS and ACUS. He also noted that many of the transparency issues were resolved with Clinton era reforms and thought that many agency representatives whom Ms. Wagner interviewed may still be relying on old information and literature.

Mr. Frisby then suggested that the committee focus on the best practices portions of the drat recommendation.

Research Director Jeffrey Lubbers stated that he and Staff Counsel Reeve Bull had severed the OMB recommendations from the other recommendations and created a revised recommendation that focuses on best practices.

Mr. Lubbers noted that the ordering of the recommendations might change. Mr. Frisby stated that ACUS staff would be free to make appropriate editorial revisions.

**Recommendation 1**[1]

Government Member Bridget Dooling asked Ms. Wagner what scientific integrity standards OMB should follow. Ms. Wagner stated that OMB should at the least follow the Office of Science and Technology Policy's (OSTP) minimum standards. Ms. Dudley recommended shelving discussion of this recommendation for another day. Mr. Elliot recommended that the language be changed to be less critical of OMB's current standards, suggesting that it be altered to state that OMB should consult with OSTP to create standards. Ms. Dooling questioned the application of the OSTP standards to OMB because OMB does not perform scientific research. Mr. Frisby stated that there is a scientific basis for some of OMB's decisions and thought that establishing standards would be useful. Mr. Tozzi noted that the Information Quality Act already provides the OMB with guidelines for its review. Ms. Wagner pointed to the Holdren memo as a basis for scientific integrity at OMB. Mr. Elliot suggested that that recommendation should propose that OMB and OSTP confer, rather than urging OMB to apply the Holdren memo. Invited Guest Francesca Grifo suggested adding some timelines to the recommendations and noted that OMB and OSTP were already in discussions. Chairman Paul Verkuil stated that ACUS does not generally include timelines in its recommendations.

**Recommendation 2**

Ms. Dudley noted that while the second recommendation sounds good on its face, it could result in unintended consequences. Mr. Elliot stated that you cannot mandate a single dissent policy for all agencies to follow. He also praised the idea of allowing dissenting opinions but noted that agencies cannot practicably do so if they create exceptions to their general dissent policies. He also suggested that we might want to make reference to the NRC's collaborative workplace policy. Ms. Wagner suggested combining recommendations 2 and 10 into one. Ms. Grifo suggested another model to look at was the FDA amendments of 2007. Ms. Dudley questioned whether we are allowing people who did not contribute to the agency report to dissent. Mr. Frisby stated that this right to dissent should be limited to those who actually contributed to any given report. Ms. Dudley stated that this right should be limited to scientific dissent and not apply to policy dissent. Government Member Remington Gregg, representing

[1] The numbering in this document refers to the numbering of the original recommendation circulated prior to the March 7, 2012 meeting rather than that of the revised recommendation circulated at the meeting itself. The original recommendation is available at http://www.acus.gov/wp-content/uploads/downloads/2012/02/COR-Science-Project-Draft-Recommendation-2-27-12-CIRCULATED-TO-COMMITTEE.pdf. Certain of the original recommendations are not discussed because they were stricken in the revised draft.

OSTP, stated that he had two concerns: (1) OSTP could not lead the way on implementing the recommendation without additional funding and (2) scientific integrity plans are just starting to take off and should be given time to take effect. Mr. Frisby stated that funding concerns are indeed important but that some entity in government should address this problem. Mr. Elliot suggested that the recommendation should apply directly to agencies rather than going through OSTP. Mr. Elliot also observed that OSTP is a small executive branch office and it may not be the best agency to deal with the recommendation. Government Member Christy Walsh stated that, if OSTP cannot handle the implementation of the recommendation, then we should identify an agency that can.

**Recommendations 7 and 8**

Mr. Elliot, discussing recommendation 7, suggested that the language did not go far enough: agencies should be expected to do more than simply identify the studies they considered; they need to explain why they went with or did not go with each study. Ms. Dooling suggested that the recommendation should also provide for publishing the literature on "regulations.gov" or some other electronic docket website. Invited guest Jamie Conrad stated that he believed that recommendations 7 and 8 do not even rise to the level required under the Information Quality Act. Mr. Elliot stated that agencies may already have to publish such information pursuant to the Administrative Procedure Act (APA) and that recommendations 7 and 8 may actually move the ball backwards. Ms. Wagner stated that all dockets are not online, and she therefore was reluctant to say that all scientific literature had to be posted online. Mr. Elliot suggested cross-referencing the recommendation with another ACUS recommendation that proposed that all rulemaking dockets should be online. Ms. Grifo questioned what the timing of these recommendations would be and noted that changes are often made to the science before the inter-agency review process.

Public attendee Richard Belzer suggested that recommendations 7 and 8 represent a step backwards and that agencies should be required to provide even unpublished reports. Mr. Elliot suggested language that would provide for the "extraordinary circumstances" in which an agency must rely on unpublished material. Ms. Wagner noted that agencies rely on unpublished material all the time and their doing so is therefore not "extraordinary." Mr. Conrad questioned why the recommendation did not also require agencies to publish underlying data. Ms. Wagner stated that she simply did not have the time to go into all the data related issues. Mr. Elliot suggested that, while Ms. Wagner's report did not study data, we could still make recommendations based on Supreme Court cases.

**Recommendation 9**

Public attendee Rick Otis noted that the recommendation could subject agency employees to retaliation. Mr. Lubbers reiterated that the authorship provision was voluntary and that a researcher can decline to place his or her name on any given agency report to which he or

she contributed. Mr. Belzer stated he was concerned that there is no data to support the recommendation and that the recommendation is based on anecdotal evidence. The committee agreed that the recommendation should be qualified to merely suggest that agencies "consider" giving authorship credit on scientific reports.

**Recommendation 11**

Mr. Lubbers noted that recommendation 11 applies only to independent agencies because executive branch agencies were already subject to peer review. Mr. Frisby stated that resources are an issue for independent agencies, and those limited resources should be taken into account if the committee is generally recommending following the OMB bulletin for peer review. Mr. Elliot suggested amending the language of the recommendation to state only that agencies should utilize "suitable peer review." Mr. Belzer recommended looking to the Information Quality Act for additional guidance.

**Recommendation 12**

Ms. Grifo and Ms. Wagner expressed concern over the removal of recommendation 12. Ms. Grifo expressed concern over draft scientific reports' never being seen by the public and stated that draft science analyses are different from draft policy reports. Mr. Frisby noted that he has been on both sides of the issue, but the deliberative process protections should not be addressed as a part of an ACUS recommendation dealing with agencies' use of science.

**Recommendation 13**

The committee agreed that recommendation 13 was generally acceptable but decided to strike the last sentence of the recommendation, which stated: "The agency should endeavor to follow the model of the NAAQS policy assessment bridging science and policy, although this step will likely involve more effort and experimentation."

**Recommendation 14**

Mr. Frisby recommended adding footnotes referring to prior recommendations on how agencies should disseminate information. The committee also agreed to amend the language of the recommendation to strike any reference to imposing obligations on OSTP.

**Recommendation 15**

Ms. Wagner explained that stopping rules are rules that require a decision to be made at a certain fixed point with the information currently available. Mr. Elliot stated that, while stopping rules may be a good idea in theory, they may in fact be illegal in certain circumstances. Ms. Wagner clarified that her thinking on the recommendation was that an agency should explain what its stopping rules were and make public how they work. The committee then agreed that this new language should be the main thrust of the recommendation.

**Meeting Close**

At the close of the meeting, Mr. Frisby noted that the committee on style would work to implement the changes recommended in the meeting. The committee approved the minutes of the October 25 meeting and the virtual meeting that took place in November and December of 2011. Mr. Frisby then closed the meeting.